STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED January 17, 2012
v	No. 300321 Macomb Circuit Court
DAVID ANTHONY COOK, Defendant-Appellant.	LC No. 2010-000999-FC

Before: GLEICHER, P.J., and CAVANAGH and O'CONNELL, JJ.

PER CURIAM.

A jury convicted defendant David Anthony Cook of first-degree premeditated murder, MCL 750.316(1)(a), for bludgeoning his live-in girlfriend with a vacuum cleaner and suffocating her with a garbage bag. Defendant admitted to killing the victim in this manner but argued that he committed the crime in the "heat of passion." Despite defendant's claim to the contrary, the trial court correctly determined that the evidence did not support defendant's requested voluntary manslaughter instruction. Defendant's contention that the trial court violated his rights by empanelling an "anonymous jury" is similarly baseless. Accordingly, we affirm defendant's conviction and sentence of life imprisonment without the possibility of parole.

On the night of December 12, 2009, defendant killed his live-in girlfriend, the mother of his two children. Defendant told police that he and the victim had a heated argument that evening after the victim accused him of inappropriately kissing her aunt. The victim threw a beer bottle at defendant, striking him in the side, and then charged at him from across the room. Defendant indicated that he punched the victim in the face, knocking her to the floor. He then straddled her and struck her several more times in the face with his fist, rendering her unconscious. When the victim regained consciousness and tried to arise, defendant smashed her head repeatedly with a vacuum cleaner, nearly severing her ear.

Believing that he had killed the victim, defendant transported her body to their bed. Defendant sat on a chair at the foot of the bed to think, but "he didn't like looking at the blood on [the victim's] face." Defendant used a large plastic garbage bag to cover the victim's head and torso and continued to watch her. After a period of time, the victim moved her hand toward the bag and tried to remove it. At that point, defendant fastened the bag to the victim's face using duct tape and also bound her hands. Defendant then sat back in the chair and waited for the victim to stop moving. He told police that "he didn't want to get in trouble . . . he wanted [the

victim] more or less dead." Defendant placed the victim's body in the trunk of his car with the intention of dumping it later, but the car's axle broke when he tried to move it. The victim's body remained in the trunk for approximately four weeks until it was discovered during the police investigation. The medical examiner conducted an autopsy and confirmed defendant's story that the victim had suffered severe blunt-force trauma to the head, but ultimately died of asphyxiation due to suffocation. Specifically, the medical examiner testified that the victim died as a result of a plastic bag being placed over her head and secured with duct tape.

I. "ANONYMOUS" JURY

At the onset of voir dire, the court informed the jury:

> [I]n this courtroom you are referred to only by juror number or seat number, not by name, no disrespect intended. Jurors in the past have asked not to have their name bantered about the courtroom. In order to do that, I have to be consistent in all cases, civil and criminal. So, you'll only be referred to by your seat number or your juror number.

Although the potential jurors' names were not used, each gave a brief personal history including their marital status, occupation, spouse's occupation, number of children and education. Neither defense counsel nor the prosecutor objected to this practice.

Defendant now claims that the trial court violated his right to due process by empanelling an "anonymous jury." Given defendant's untimely objection on this ground, our review is limited to plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). "An 'anonymous jury' is one in which certain information is withheld from the parties, presumably for the safety of the jurors or to prevent harassment by the public." *People v Williams*, 241 Mich App 519, 522; 616 NW2d 710 (2000). The use of an "anonymous jury," however, poses potential harm to the criminal defendant's interest in conducting a meaningful examination of the jury and maintaining the presumption of innocence. *Id.* at 522-523.

The empanelled jury was not "anonymous" as defined by this Court's precedent. The trial court merely exchanged the potential jurors' names for their jury numbers. No other information was kept from the parties. See *id.* at 523. Moreover, the trial court did not harm defendant's rights by withholding the names of the potential jurors. The trial court conducted an open examination of the prospective jurors and elicited biographical information from those individuals. The trial court allowed for a reasonable disclosure of facts about each prospective juror and advised the jury venire that "[i]t's important that we know a little bit about you . . . ." The attorneys were able to freely question the potential jurors about their histories to ascertain whether each person was qualified to sit on the jury. See *id.* at 523-524.

The court's method also did not erode the presumption of innocence. The court specifically told the jury venire that it was his standard practice in all cases, including civil trials, to use juror numbers rather than names. The trial court in no way implied that defendant was dangerous or guilty of the charged offense. See *id.* at 524. And "[t]here is no indication that any of the jurors believed that there was any significance in the use of numbers instead of names"

besides the court's stated preference for the procedure. *People v Hanks*, 276 Mich App 91, 94; 740 NW2d 530 (2007). The court also fully instructed the jury regarding the presumption of innocence. No additional cautionary instruction was required in this case to protect defendant's rights. As the court's procedure neither invaded defendant's ability to meaningfully examine the jury venire nor weakened the presumption of innocence, we find no plain error requiring reversal.

II. MANSLAUGHTER INSTRUCTION

Defendant also challenges the trial court's refusal to give his requested jury instruction on the lesser included offense of common-law voluntary manslaughter. We review claims of instructional error de novo. *People v Tierney*, 266 Mich App 687, 714; 703 NW2d 204 (2005). "[A] requested instruction on a necessarily included lesser offense is proper if the charged greater offense requires the jury to find a disputed factual element that is not part of the lesser included offense and *a rational view of the evidence would support the instruction*." *People v Cornell*, 466 Mich 335, 357; 646 NW2d 127 (2002) (emphasis added). We review for an abuse of discretion the court's underlying determination whether an instruction is warranted based on the record evidence. *People v Gillis*, 474 Mich 105, 113; 712 NW2d 419 (2006).

It is now well established that voluntary manslaughter is a necessarily included lesser offense of murder. *People v Mendoza*, 468 Mich 527, 536; 664 NW2d 685 (2003). The offenses are distinguished by the element of malice alone, the absence of which mitigates an intentional killing from murder to manslaughter. *Id.* at 540-541. The lack of malice is shown when the defendant kills "in the heat of passion . . . caused by an adequate provocation" (one that "would cause [a] reasonable person to lose control") and there is no "lapse of time during which a reasonable person could control his passions." *People v Pouncey*, 437 Mich 382, 388-389; 471 NW2d 346 (1991). Generally, the adequacy of the provocation is a question of fact for the jury. *Tierney*, 266 Mich App at 715. However, if no reasonable jury could conclude that the "provocation was adequate" to cause the defendant's reaction, the court need not give a manslaughter instruction. *Id.*

A rational view of the record evidence simply does not support that defendant killed the victim in the heat of passion. Defendant avers that the victim adequately provoked his "heat of passion" during their argument and by striking him with a beer bottle. Although tenuous, a jury *arguably* could conclude that defendant acted in the heat of passion when he responded by punching the victim and striking her with a vacuum. However, the victim did not die as a result of this savage beating. Rather, the medical examiner testified that the victim was suffocated to death with a garbage bag. Defendant admitted that there was a lapse of time after he laid the victim on the bed and covered her face with a garbage bag but before he realized that the victim was still alive. Defendant admitted that he reflected on his actions during that time. This was a "reasonable time . . . for the blood to cool and reason to resume its habitual control. *People v Townes*, 391 Mich 578, 590; 218 NW2d 136 (1974). Defendant also admitted that he then sealed the bag around the victim's head to kill her and prevent discovery of his crime (likely only assault with intent to murder), not out of a temporary rage. Defendant then sat in a chair and watched while the victim suffocated to death. The passage of time combined with defendant's methodical actions to eradicate the sole witness against him shows "deliberation and reflection," not a person "act[ing] out of a temporary excitement." *Id.* Based on the record evidence, no

reasonable jury could conclude that defendant lacked malice when he suffocated the victim, thus mitigating his crime to manslaughter. Accordingly, the trial court properly denied defendant's request for the lesser included offense instruction.

Affirmed.

/s/ Elizabeth L. Gleicher
/s/ Mark J. Cavanagh
/s/ Peter D. O'Connell